

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID L. FRANK

Claimant

VS.

GOODYEAR TIRE & RUBBER COMPANY

Respondent

AND

LIBERTY MUTUAL

Insurance Carrier

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Docket No. 1,016,944

ORDER

Claimant appealed the August 18, 2004 preliminary hearing Order Denying Compensation (Order) entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant alleges he injured his neck while working for respondent. In the August 18, 2004 preliminary hearing Order, Judge Avery found that claimant sustained accidental injury arising out of and in the course of his employment with respondent. But the Judge also found that claimant did not provide respondent with timely notice of his accidental injury and that claimant did not prove he had just cause for failing to provide notice within the 10-day time provision set forth in the Workers Compensation Act.¹ Accordingly, the Judge denied claimant's request for workers compensation benefits.

Claimant contends Judge Avery erred. Claimant argues he believed the problems he was experiencing would resolve and that it was not until April 8, 2004, when claimant went to the emergency room, that he realized the severity of his condition. Further, claimant argues he provided timely notice of his accidental injury or had just cause to extend the period for providing notice to 75 days.² Claimant requests that the Board grant him workers compensation benefits.

¹ See K.S.A. 44-520.

² *Id.*

On the other hand, respondent and its insurance carrier (respondent) contend the Judge's finding regarding timely notice should be affirmed. In the alternative, respondent argues claimant failed to prove he sustained accidental injury arising out of and in the course of his employment with respondent.

The issues before the Board on this appeal are:

1. Did claimant sustain accidental injury arising out of and in the course of his employment with respondent?
2. If so, did claimant provide respondent with timely notice of his accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in March 1998. By February 2003, claimant was a "first floor trucker" with respondent, which involved operating a fork lift and bending and using his neck constantly. Claimant testified he was on the first floor truck more than the off batch truck he had previously operated for respondent. Claimant also testified that his supervisor, Aaron Stockerbaum, told him the first floor trucker job would be harder on his back and neck than the truck he was on previously. Claimant described the first floor trucker job as involving constant, long hauls on bumpy floors and constantly twisting and turning.

In early 2001, claimant underwent examinations and studies for bilateral upper extremity pain, weakness and numbness that began in mid to late 2000. The impression from a March 2, 2001 MRI stated claimant's cervical canal was congenitally small, particularly from the fourth cervical vertebra to the seventh cervical vertebra, with estimated mild central spinal stenosis at those levels. Further, small right lateral disc protrusions were noted at C3-4 and C4-5 producing right-sided foraminal narrowing at both levels, more pronounced at C4-5.

According to the history provided by claimant as set forth in a June 2004 report by Dr. Dick Geis, who examined claimant at claimant's attorney's request on June 10, 2004, after an examination in May 2001 regarding his bilateral upper extremity symptoms at that time, claimant "went to his chiropractor who fixed his hand numbness."³

In December 2003, claimant started experiencing problems with his neck. His symptoms included headaches and muscle spasms in his upper back. While continuing

³ See P.H. Trans., Cl. Ex. 1.

to perform his regular work duties, claimant sought treatment from a chiropractor for his symptoms, which helped temporarily.

When the chiropractic treatment no longer helped, on March 24, 2004, claimant sought treatment from Dr. Chester R. Davis, his personal physician. Dr. Davis' treatment in late March and early April 2004 included medication, ordering an MRI, and referrals to neurosurgeon Dr. John D. Ebeling and a Dr. Sankoorikal. Claimant last performed work for respondent on approximately March 26, 2004.

On April 8, 2004, claimant went to the emergency room of a local hospital. Claimant testified he went to the hospital because he could not tolerate the pain anymore. According to claimant, hospital personnel suggested claimant see neurosurgeon Dr. Robert M. Beatty. Although Dr. Davis had referred claimant to Dr. Ebeling, the appointment was weeks away. Claimant saw Dr. Beatty on April 13, 2004, and underwent a cervical myelogram and a post-myelogram CT scan of the cervical spine. The CT scan showed a relatively shallow central disc herniation at C5-6, which slightly effaced the spinal cord, and a prominent osteophyte disc complex within the right lateral recess at C3-4 with narrowing of the ipsilateral nerve root canal. On April 15, 2004, Dr. Beatty performed an anterior cervical discectomy and fusion at C5-6.

Claimant provided respondent with notice of his accidental injury on April 16, 2004. At the preliminary hearing, claimant testified he knew while working for respondent that his problems were related to the work he was performing. Claimant also testified he was aware that he needed to provide notice of a work-related injury within 10 days of the injury. Claimant indicated that April 8, 2004, was the first time he believed it was necessary to claim his condition as a workers compensation matter.

At his attorney's request, claimant saw Dr. Dick Geis for an examination in June 2004. Dr. Geis diagnosed cervical degenerative disc disease with disc herniation status post-surgery and concluded claimant's neck problems and April 2004 surgery were caused by his work activities of driving a fork lift with constant repetitive head turning and bouncing on uneven surfaces.

In addition to the headaches, muscle spasms and pain claimant has experienced, claimant has also had bilateral upper extremity and left lower extremity symptoms.

The Board finds no reason to disturb Judge Avery's finding that claimant sustained accidental injury arising out of and in the course of his employment with respondent. Therefore, the Board affirms that finding. Additionally, the Board affirms the Judge's finding that claimant did not provide respondent with timely notice of his accidental injury and that claimant did not prove he had just cause for failing to provide notice within 10 days of his accidental injury.

Claimant testified that while working for respondent he knew his problems were related to the work he was performing. Claimant also testified he was aware that he needed to provide notice of his injury within 10 days of the injury.

In general, workers must provide notice of their accidental injuries to their employers within 10 days of an accident.⁴ Just cause for not providing notice within this 10-day period may extend the period for providing notice to 75 days.⁵ Claimant believed the problems he was experiencing were related to his work for respondent and he was aware he needed to provide notice of his injury within 10 days of the injury.

The Board finds and concludes claimant did not provide respondent with timely notice of his accidental injury and that claimant did not prove he had just cause for failing to provide notice within 10 days of his accidental injury. Perhaps claimant's supervisor had knowledge or reasonable suspicion that claimant's work activities were responsible for claimant's symptoms. This record, however, fails to establish such fact.

The August 18, 2004 preliminary hearing Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁶

WHEREFORE, the Board affirms the August 18, 2004 preliminary hearing Order Denying Compensation entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of November 2004.

BOARD MEMBER

c: Michael J. Unrein, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ K.S.A. 44-520.

⁵ *Id.*

⁶ K.S.A. 44-534a(a)(2).